FEEDMEAL MALAYSIA SDN BHD

v.

TEH CHO YEOW & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO: 1-22-119-2000]
8 MAY 2003

CIVIL PROCEDURE: *Rules of court - Non-compliance - Allegation of non-compliance with O. 6 r. 7(1) and O. 6 r.7 (2A), Rules of the High Court 1980 ('RHC') - Effect of recent amendments to RHC - End to any reliance on procedural objections based on technical non-compliance of the rules*

CIVIL PROCEDURE: *Rules of procedure - Observance of - Order 3 r. 5(1) & (2), O. 92 r. 4 of the RHC - Wide powers to High Court to grant renewal or extension of time to prevent injustice or abuse of court process*

CIVIL PROCEDURE: *Service - Irregularity of service - Allegation of - Evasion of service - Whether there was personal service*

The learned registrar had dismissed the defendants' application in encl. 20. In encl. 20, the defendants, *inter alia* had applied to set aside: (i) the order allowing the plaintiff to serve the writ of summons and statement of claim on the 1st and 4th defendants by way of substituted service; (ii) the service of the writ and the statement of claim on the 1st and 4th defendants; and (iii) the service of the writ and the statement of claim on the 2nd and 3rd defendants. Hence, this was the defendants' appeal before the judge in chambers to proceed by way of rehearing and to deal with the application as a hearing for the first time.

Held:

[1] Essentially, encl. 20 were procedural objections grounded on non-compliance of O. 6 r. 7(1) and O. 6 r.7 (2A) of the Rules of the High Court 1980 ('RHC'). Such objections would have been upheld if not for the recent amendments to the RHC, which have put an end to any reliance on procedural objections based on technical non-compliance with the rules, and to proceed with substantive issues and justice of the case. (pp 15 a, d & 16 f)

[2] Order 3 r. 5(1) & (2), and O. 92 r. 4 of the RHC confer wide powers on the High Court to grant renewal or extension of time for the purpose of preventing injustice or abuse of the court process. (p 17 a)

[3] Based on the facts, the learned registrar was justified in finding that the 2nd and 3rd defendants had attempted to evade service. On the affidavits produced, he was also justified in holding that the writ and the statement of claim was personally served on them respectively. Thus, the learned registrar's decision was correct and was thereby affirmed. (p 17 h & 18 g)

[Appeal dismissed.]

Case(s) referred to:

AlliedBank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 CA ***(refd)***

Beauford Baru Sdn Bhd v. Gopal Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Blundell v. Rimmer [1971] 1 All ER 1072 ***(refd)***

Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd [1996] 1 CLJ 444 HC ***(refd)***

Kenneth Allison Ltd & Ors v. AE Limehouse & Co [1991] 3 WLR 671 ***(foll)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

Mokhtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489 CA ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***

Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 CA ***(refd)***

Supreme Finance (M) Bhd v. Wing Hong How [1999] 2 CLJ 1057 CA ***(foll)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 1A, O. 3 r. 5(1), (2), O. 6 r. 7(1), (2A), O. 10 r. 1(1), O. 12 r. 7(1), O. 13 r. 1, O. 62 rr. 1, 3, O. 92 r. 4

Other source(s) referred to:

The Supreme Court Practice, 1985, vol 1, p 996

For the plaintiff - SY Lee; M/s ST Lee & Partners
For the defendants - Stephanie SF Yong; M/s Yap Koon Roy & Assoc

Reported by Raja Vishnu Sivarajah

JUDGMENT

Low Hop Bing J:

On 24 April 2002, *vide* encl. (20), the defendants applied to set aside:

1. the order allowing the plaintiff to serve the writ of summons dated 27 September 2000 ("the writ') and the statement of claim dated 25 September 2000 ("the statement of claim") on the first and the fourth defendants in the action herein by way of substituted service on 2 November 2001;
2. the order renewing the writ for six months from 2 November 2001;
3. the service of the writ and the statement of claim on the first and the fourth defendants pursuant to O. 12 r. 7(1) of the Rules of the High Court 1980;
4. the respective certificate of non-appearance dated 22 August 2001 against the second and the third defendants; and
5. the service of the writ and the statement of claim on the second and the third defendants under O. 13 r 1.

   (For ease of reference, all orders and rules stated in this judgment are the orders and rules in the Rules of the High Court 1980)

After hearing the defendants' application, the learned registrar dismissed it with costs on 6 September 2002, basically on the ground that the issues raised for the defendants were strictly technical.

Submission For Defendants

Cik Stephanie S.F. Yong, learned counsel for the defendants, submitted that the order for substituted service dated 2 November 2001 ("the SS order") was irregular, defective and invalid due to the lapse of the six-month validity period of the writ on 26 March 2001, it having been issued on 27 September 2000. Reliance was placed on the amended O. 6 r. 7(1) *vide* PU(A) 342/2000 with effect from 21 September 2000 which, she added, as a special provision should prevail over the general provision in O. 3 r. 5.

Similarly, she stressed that the order renewing the writ from 2 November 2001 ("the renewal order") was irregular etc as the application was made on 22 August 2001 which was after the lapse of the writ on 26 March 2001, thereby not complying with the amended O. 6 r. 7(2A) effective from 21 September 2000.

It was submitted that the certificate of non-appearance ("CNA") against the second defendant was filed on the basis of the service of the writ on the second defendant at 5pm on 11 January 2001 when the second defendant was not at the address at Batu 29, Sungai Dua, Asahan, 77100 Melaka ("the address"), but was instead working in Kuala Lumpur, and the punch card was produced.

She argued that O. 10 r. 1(1) requires service on the second defendant personally or by sending it by prepaid AR registered post addressed to his last known address and that personal service as provided for in O. 62 r. 3 has not been complied with.

It was contended that this CNA against the third defendant was based on a lapsed writ which was purportedly served on the third defendant at 6pm at the address on 28 June 2001 when the third defendant was working in Kuala Lumpur and that again there was non-compliance with O. 10 r. (1) and O. 62 r. 3.

In relation to O. 92 r. 4, it was contended that it only confers the jurisdiction to extend time for an application which is regular, as the court has to do justice.

Contention For Plaintiff

Cik SY Lee, learned counsel for the plaintiff, contended that the writ was regular and that on 11 January 2001, a clerk from the firm of plaintiff's solicitors ("the clerk") together with a representative of the plaintiff ("the plaintiff's representative") went to the address to serve the writ and the statement of claim on the second defendant who was identified by the plaintiff's representative but who declined to accept service, as a result of which the clerk left a copy thereof for the second defendant's attention.

She added that on 28 June 2001, the clerk and the plaintiff's representative went to the address to serve the writ and the statement of claim on the third defendant but since the third defendant refused to accept service the clerk left a copy thereof for the third defendant's attention.

In respect of the first and the fourth defendant, it was submitted that since the clerk did on 11 January 2001 and 28 June 2001 attempt unsuccessfully to effect personal service on them, the plaintiff had applied for and obtained the SS order and the renewal order.

She relied on O. 3 r. 5 and requested the court to exercise inherent jurisdiction under O. 92 r. 4, as the defendants were attempting to evade service.

Decision On Appeal

Rehearing

The appeal before me as judge in chambers is to proceed by way of rehearing and to deal with it as a hearing for the first time: *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 1 CLJ 444; *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; *Blundell v. Rimmer* [1971] 1 All ER 1072.

Latest Procedural Law

While both the learned counsel have referred to the amendment contained in O. 6 r. 7(1) and O. 6 r. 7(2A) *vide* PU(A) 342/2000 which took effect from 21 September 2000, they seem to have missed the opportunity to update themselves with the more recent amendment to the Rules of the High Court 1980 *vide* PU(A) 197/2002 which came into force on 16 May 2002. The importance and impact of this recent amendment will be intimated later in this judgment.

The on-going exercise of keeping abreast and updating oneself with the latest development in the law is a virtue and indeed a second nature of an advocate and solicitor, especially in one's early professional practice, so that a sound starting point may be established in order to enhance one's competence in and to eradicate one's ignorance of the law.

SS And Renewal Orders And Service On First, Third And Fourth Defendants

The procedural objections grounded on non-compliance with O. 6 r. 7(1) and O. 6 r. 7(2A) are in my view strictly technical in nature. Such objections would have been attractive and upheld had there been no subsequent judicial exhortations and recent amendments to the Rules of the High Court 1980, which have collectively put an end to any reliance on procedural objections based on technical non-compliance with the rules, and to proceed with substantive issues and justice of the case.

In *Beauford Baru Sdn Bhd v. Gopal Krishnan VK Gopalan* [2002] 3 CLJ 686, at pp. 691 to 692, I said:

> As we move towards the era of facilitating the process of litigation, the raising of preliminary objection on technical grounds would certainly and clearly be a thing of the past. Quite recently, the Court of Appeal in *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 through the authoritative judgment of Ahmad Fairuz JCA (now Ag. President of the Court of Appeal and Chief Judge (Malaya)) expressly stated that preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving. The Court of Appeal had no hesitation in overruling the procedural technical objection. This principle is further manifested in the parallel and equipollent provisions in r. 3A of the Rules of the Court of Appeal (Amendment) 2002 (PU(A) 196/2002) and O. 2 r. 3 of the Rules of the High Court (Amendment) 2002 (PU(A) 197/2002) both of which came into force on 16 May 2002 in the following terms.

Preliminary objection on the ground of non-compliance shall not be allowed

3A. A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)

3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

It is clearly the intention and wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.

(see also *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 FC)

Further O. 1A, which took effect on 16 May 2002 *vide* PU(A) 197/2002 provides as follows:

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

Although under O. 6 r. 7(1), the writ has a life span of six months and under O. 6 r. 7(2A) a renewal thereof has to be applied for before the expiry thereof, there is nothing in the renewal order which is prejudicial to the defendants as there was no suggestion or submission that the renewal order has caused prejudice or miscarriage of justice to the defendants eg, by way of limitation to render the plaintiff's cause of action statute-barred.

In *Mokhtar Amin v. Mohamed Moktar Omar* [2001] 4 CLJ 489, the Court of Appeal held, *inter alia*, that non-compliance with procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

Order 3 r. 5(1) and (2), and O. 92 r. 4 confer upon our High Court sufficiently wide powers to grant renewal or extension of time and to prevent injustice or to prevent an abuse of the process of the court. Both these provisions are respectively reproduced as follows:

5 Extension, etc of time (O. 3 r. 5)

(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

4 Inherent powers of the Court (O. 92 r. 4)

For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

A case in point under O. 3 r. 5 and O. 92 r. 4 is *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773 in which the issue was whether it was permissible for the court to grant a series of 12-month extensions to resuscitate a writ which had expired in August 1986. The learned registrar answered it in the affirmative while the learned judge on appeal held in the negative but the Court of Appeal upheld the learned registrar's decision, the reason being that there is wide power under O. 3 r. 5 conferred upon the High Court to extend time, and under O. 92 r. 4 the inherent jurisdiction to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The Court of Appeal reiterated that a rule of court should not be construed so as to produce unfairness or a manifest injustice: see also *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491.

Service On Second And Third Defendants

The affidavit of service revealed that the writ and statement of claim was served on the second defendant by the clerk of the plaintiff's solicitors at the second and the third defendant's address on 11 January 2001 and 28 June 2001 respectively but the second and the third defendants had refused to accept it, and hence a copy thereof was left in the second and the third defendants' premises with their attention drawn to it respectively.

The procedurel law on personal service is contained in O. 10 r. 1 and O. 62 r. 1 in the following words:

> **1. General provisions (O. 10 r. 1)**
>
> (1) Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant or by sending it by prepaid AR registered post addressed to his last known address and so far as is practicable, the first attempt at service shall be made not later than one month from the date of issue of writ.
>
> **1 When personal service required (O. 62 r. 1)**
>
> (1) Any document which by virtue of these rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these rules or by order of the Court is required to be so served.

In *Supreme Finance (M) Bhd v. Wing Hong How* [1999] 2 CLJ 1057, our Court of Appeal followed the decision of the House of Lords in *Kenneth Allison Ltd & Ors v. AE Limehouse & Co* [1991] 3 WLR 671 "that personal service required the handling of the document to the person to be served or telling him what it contained and leaving it with or near him;"

In *AlliedBank (Malaysia) Bind v. Yau Jiok Hua* [1998] 2 CLJ 33, Augustine Paul JC (now J), in defining what constitutes personal service referred to *The Supreme Court Practice* [1985] vol. 1 p. 996 as follows:

> To effect personal service, the clerk or other person entrusted with the task should first satisfy himself that he has found the right man. He should then hand to or leave with the person to be served a copy of the writ. If the person served will not take the copy, he should tell him what it contains and leave it as nearly in his possession or control as he can.

It seems clear to me that the learned registrar is justified in his finding that the second and third defendants have attempted to evade service. On the affidavits, he is also justified in holding that the writ and the statement of claim have been personally served on them respectively.

Conclusion

On the foregoing grounds, I hold that the learned registrar's decision is correct and I hereby affirm it. Hence, the defendants' appeal is dismissed with costs.